Simplex Sdn Bhd lwn Mohd Samsol bin Md Muzer dan satu lagi

MAHKAMAH TINGGI (KUALA LUMPUR) — PERMOHONAN BAGI SEMAKAN KEHAKIMAN NO 25–131–07 TAHUN 2014
ZALEHA YUSOF H
24 JULAI 2014

Prosedur Sivil — Semakan kehakiman — Permohonan bagi perintah mandamus — Arahan pelupusan wang dalam akaun — Pelupusan bertujuan untuk membayar gaji pekerja-pekerja pemohon dan pembayaran hutang — Sama ada permohonan satu salah guna — Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 s 44(1)

Pemohon memohon kebenaran memulakan prosiding semakan kehakiman terhadap responden-responden bagi mendapatkan satu perintah mandamus untuk mengarahkan responden pertama melupuskan wang dalam akaun pemohon yang telah dibekukan melalui perintah di bawah s 44(1) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 ('AMLA'). Tujuan pelupusan itu ialah untuk pembayaran gaji pekerja-pekerja pemohon dan pembayaran hutang kepada pemuitang-pemuitang pemohon. Peguam Negara Malaysia telah membantah terhadap permohonan untuk kebenaran ini dengan alasan bahawa ianya adalah satu penyalahgunaan proses kerana apa yang dipohon oleh pemohon sebenarnya ialah supaya mahkamah ini menggunakan fungsi undang-undang pentadbirannya dalam melaksanakan bidang kuasa sivil untuk mengkaji proses siasatan yang dibuat oleh responden di bawah s 44(1) AMLA tanpa responden melaksanakan budi bicara di bawah s 44(3) AMLA. Adalah juga hujahan pihak peguam negara bahawa memandangkan responden belum melaksanakan budi bicaranya di bawah s 44(3) AMLA, maka tiada keputusan untuk disemak tetapi yang ada hanyalah satu pelaksanaan fungsi bagi memudahkan proses penyiasatan.

Diputuskan, menolak permohonan tanpa kos perintah untuk:

(1) Terdapat persamaan antara s 44(1) dengan s 50(1) AMLA. Dalam s 4(1), kuasa diberi kepada agensi penguatkuasaan untuk membekukan harta jika mengesyaki terdapat kesalahan di bawah s 44(1) AMLA sementara dalam s 50(1), kuasa diberikan kepada pendakwa raya untuk memerintahkan institusi kewangan supaya tidak melupuskan harta yang menjadi hal perkara kesalahan di bawah s 4(1) AMLA (lihat perenggan 4–5).

(2) Sama seperti s 50(1), tujuan pembekuan di bawah s 44(1) juga adalah untuk mendapatkan keterangan bagi tujuan pendakwaan di bawah s 4(1) AMLA. Ianya adalah satu proses penyiasatan dan dengan jelasnya bukanlah satu keputusan yang boleh disemak di bawah suatu semakan kehakiman (lihat perenggan 7).

(3) Pembekuan sebenarnya hanyalah satu prosedur untuk pengumpulan keterangan semata-mata, ianya adalah satu proses penyiasatan dan bukanlah satu keputusan yang boleh dilakukan semakan kehakiman oleh mahkamah ini (lihat perenggan 9).

(4) Seksyen 57 itu jelas menyatakan bahawa keesahan sesuatu pembekuan itu tidak akan terjejas oleh sebarang bantahan terhadapnya. Seksyen 44(3) memberi kuasa budi bicara kepada sesuatu agensi penguatkuasaan untuk mengeluarkan arahan seperti yang dipohon oleh pemohon di dalam permohonan ini. Adalah undang-undang yang mantap bahawa mandamus hanya boleh diperintahkan jika terdapat kewajipan untuk melaksanakan sesuatu tanggungjawab dan bukan terhadap kuasa budi bicara. Seksyen 44(3) AMLA ialah suatu kuasa yang bersifat budi bicara dan pelaksanaan suatu fungsi pentadbiran (lihat perenggan 10–11).

(5) Kuasa budi bicara belum lagi dilaksanakan oleh responden. Walaupun pemohon pada hari yang sama perintah pembekuan itu diterima memaklumkan responden untuk melupuskan wang dalam akaun, responden belum lagi membuat keputusannya. Tanpa keputusan oleh responden, mahkamah ini tidak mempunyai sebarang kuasa untuk membuat perintah mandamus yang dipohon jikapun diandaikan bahawa pihak responden sememangnya mempunyai kewajipan untuk membuat arahan yang sedemikian. Jika mahkamah bertindak sedemikian, seolah-olah mahkamah telah mencampuri urusan siasatan di bawah s 44(1). Pemohon sepatutnya menunggu sehingga pihak responden memberikan maklum balas atau menjawab surat pemohon itu sebelum berlari untuk mendapatkan perintah mahkamah ini (lihat perenggan 12).

[English summary

The applicant applied for leave to commence a judicial review against the respondents to obtain a mandamus order to order the first respondent to dispose of the applicant's account which had been frozen via an order under s 44(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLA'). The purpose of the disposal was to pay the salaries of the applicant's employees and for the payment of debt to the applicant's creditors. The Attorney General of Malaysia had objected the application on the ground that it was an abuse of process as what was applied by the applicant was for the court to exercise its legal function in its administration in exercising its civil discretion to review the investigation process made by the respondent under s

44(1) of the AMLA without the respondent exercising its discretion under s 44(3) of the AMLA. It was also the contention of the attorney general that since the respondent had not exercised his discretion under s 44(3) of the AMLA, there was no decision to be reviewed but what was available was the execution of the function to ease up the investigation process.

Held, dismissing the claim with no order as to costs:

(1) There was similarity between ss 44(1) and 50(1) of the AMLA. Under s 4(1), the power given to the enforcement agency to freeze the property if there was suspicion that there was an offence under s 4(1) of the AMLA while under s 50(1), the power given to the public prosecutor to order a monetary institution to not dispose the property that was the subject matter of the offence under s 4(1) of the AMLA (see paras 4–5).

(2) Same as s 50(1), the purpose of freeing under s 44(1) was also to obtain evidence for the purpose of prosecution under s 4(1) of the AMLA. It was an investigation process and clearly was not a decision which could be reviewed under a judicial review (see para 7).

(3) Freezing was actually only a procedure to gather evidence. It was an investigation process and this was not a decision where judicial review could be exercised by the court (see para 9).

(4) Section 57 clearly stated that the legality of a freeze is not affected by an objection against it. Section 44(3) gave discretion to an enforcement agency to issue and order as applied by the applicant in this application. It is trite law that a mandamus could be ordered if there was an obligation to carry out a responsibility and not against discretionary power. Section 44(3) AMLA was power that was discretionary in nature and the execution of an administrative function (see paras 10–11).

(5) Discretionary power was not exercised by the respondent. Even though the applicant on the same day the freezing order was obtained had informed the respondent to dispose the monies in the account, the respondent had not made a decision on it yet. Without the decision of the respondent, the court did not have any power to make a mandamus order applied for even if it was assumed that the respondent had an obligation to make such order. If the court acted as such, it was as if the court was interfering with the investigation under s 44(1). The applicant should have waited until the respondent gave a feedback or replied his letter before chasing for an order of this court (see para 12).]

Kes-kes yang dirujuk

City Growth Sdn Bhd & Anor v The Government of Malaysia [2006] 1 MLJ 581; [2005] 7 CLJ 422, MT (dirujuk)

R v Sloan [1990] 1 NZLR 474, MT (dirujuk)

Workon Sdn Bhd v The Director of Lands & Surveys, Sabah [1999] 4 MLJ 177, MT (dirujuk)

Undang-undang yang dirujuk

Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 ss 4(1), 44(1), 44(3), 50(1), s 57

Abi Mursyidin bin Awal (K Shanker Kalivana Sundaram (J R Ravendren & Assoc) bagi pihak pemohon.

Kogilambigai a/l Muthusamy (Peguam Persekutuan, Jabatan Peguam Negara Malaysia) bagi pihak responden.

Zaleha Yusof H:

[1] Ini ialah permohonan pemohon untuk kebenaran memulakan prosiding semakan kehakiman terhadap responden-responden bagi mendapatkan satu perintah mandamus untuk mengarahkan responden pertama melupuskan wang dalam akaun Maybank pemohon yang bernombor 014280402164, yang telah dibekukan melalui perintah yang bertarikh 27 Jun 2014 di bawah s 44(1) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 ('AMLA'). Tujuan pelupusan itu ialah untuk pembayaran gaji pekerja-pekerja pemohon dan pembayaran hutang kepada pemiutang-pemiutang pemohon.

[2] Peguam Negara Malaysia telah membantah terhadap permohonan untuk kebenaran ini dengan alasan bahawa ianya adalah satu penyalahgunaan proses kerana apa yang dipohon oleh pemohon sebenarnya ialah supaya mahkamah ini menggunakan fungsi undang-undang pentadbirannya dalam melaksanakan bidang kuasa sivil untuk mengkaji proses siasatan yang dibuat oleh responden di bawah s 44(1) AMLA tanpa responden melaksanakan budi bicara di bawah s 44(3) AMLA. Adalah juga hujahan pihak peguam negara bahawa memandangkan responden belum melaksanakan budi bicaranya di bawah s 44(3) AMLA, maka tiada keputusan untuk disemak tetapi yang ada hanyalah satu pelaksanaan fungsi bagi memudahkan proses penyiasatan.

KEPUTUSAN

[3] Saya telah meneliti kertas-kertas kausa dan hujahan pihak-pihak.

[4] Saya dapati terdapat persamaan di antara s 44(1) ini dengan s 50(1) AMLA. Diperturunkan peruntukkan kedua-dua seksyen itu di bawah:

> 44 Freezing of property
>
> (1) Subject to section 50, where an enforcement agency, having the power to enforce the law under which a serious offence is committed, has reasonable grounds to suspect that an offence under subsection 4(1) or a terrorism financing offence has been, is being or is about to be committed by any person, it may issue an order freezing any property of that person or any terrorist property, as the case may be, wherever the property may be, or in his possession, under his control or due from any source to him.
>
> 50 Seizure of movable property in financial institution
>
> (1) Where the Public Prosecutor is satisfied on information given to him by an investigating officer that any movable property or any accretion to it which is the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence or terrorist property or evidence in relation to the commission of such offence, or which is terrorist property is in the possession, custody or control of a financial institution, he may, notwithstanding any other written law or rule of law, after consultation with Bank Negara Malaysia, the Securities Commission or the Labuan Offshore Financial Services Authority, as the case may be, by order direct the financial institution not to part with, deal in or otherwise dispose of such movable property or any part of it until the order is revoked or varied.

[5] Seperti yang ditunjukkan di atas, di dalam s 4(1), kuasa diberi kepada agensi penguatkuasaan untuk membekukan harta jika mengesyaki terdapat kesalahan di bawah s 44(1) AMLA sementara di dalam s 50(1) kuasa diberi kepada pendakwa raya untuk memerintahkan institusi kewangan supaya tidak melupuskan harta yang menjadi hal perkara kesalahan di bawah s 4(1) AMLA.

[6] Di dalam kes *City Growth Sdn Bhd & Anor v The Government of Malaysia* [2006] 1 MLJ 581; [2005] 7 CLJ 422 YA Hakim Raus Sharif (ketika itu) memutuskan:

> Looking at the order of the deputy public prosecutor as well as the provision of s 50(1) of AMLA, I am of the view that the order of the deputy public prosecutor is not reviewable under O 53 of the RHC. To me, s 50(1) of AMLA is part and parcel of the investigation process into an offence under s 4(1) of AMLA. I appears that in order to facilitate the investigation into the offence of money laundering, the law has provided with the Public Prosecutor the power to assist the investigating officer. Clearly, s 50(1) of AMLA was enacted to enable the public prosecutor or his deputy to make an order of seizure of movable properties in the possession of the financial institutions by ordering the financial institutions not to part, deal in, or otherwise

dispose of such property or any part of it until the order is revoked or varied. Thus, by issuing the said orders the deputy public prosecutor was merely exercising a function under AMLA.

It has been said before that not all decisions and action of a public officer is reviewable by the court. In *R v Sloan* [1990] 1 NZLR 474, Justice Hardie Boys said:

> ... it is not every decision made under statutory authority that is subject to judicial review. A decision must go beyond what is merely administrative or procedural ... or the exercise of a function rather than a power ... Quite plainly, the conclusions reached by the inspector here are of this kind and so are not reviewable. To hold otherwise would, as Mr Neave submitted, open up the investigation process of all law enforcement agencies to constant judicial review; and that cannot have been the intention of Parliament.

Similarly, in *Haji Ahmad Azam bin Mohamed Salleh dan 5 Lagi lwn Jabatan Pembangunan Koperasi Malaysia dan 2 Lagi* [2004] 4 MLJ 86 I held that the public officers exercising a function under the Cooperative Societies Act 1993, is not reviewable under O 53 of the RHC.

Likewise in this case, the order of the deputy public prosecutor under s 50(1) of AMLA is also not reviewable. This must be so, otherwise if all decisions and action of public authority of this nature are amendable to court's review, then the government machinery may not be able to function smoothly. The investigation process of all law enforcement agencies will be open to constant judicial review. To borrow the words of Justice Hardie Boys in *R v Sloan* 'that cannot have been the intention of Parliament'.

It is submitted by learned counsel for all applicants that the issuing of the s 50(1) order, the deputy public prosecutor has crippled their business and has further failed to appreciate that the said orders would subject them and its directors and officers to liabilities resulting from their inability to utilize its funds. But as stated earlier, the s 50(1) order is to secure the evidence for the purpose of criminal prosecution under s 4(1) of AMLA. It is not an administration decision but a decision in relation to criminal investigation. Thus, the rights of all applicants in the four cases lies in the criminal, as well as civil law and not in an administration action. The deputy public prosecutor was performing his duties under s 50(1) of AMLA and cannot be made accountable by way of judicial review.

[7] Sama seperti s 50(1) seperti yang diperuntukkan di atas, tujuan pembekuan di bawah s 44(1) juga adalah untuk mendapatkan keterangan bagi tujuan pendakwaan di bawah s 4(1) AMLA. Ianya adalah satu proses penyiasatan dan dengan jelasnya bukanlah satu keputusan yang boleh disemak di bawah suatu semakan kehakiman.

[8] Di dalam kes *R v Sloan* [1990] 1 NZLR 474, Mahkamah Tinggi New Zealand memutuskan seperti yang berikut:

> The first difficulty is that the statute does not confer upon inspectors the power to decide whether an activity is unlawful. All they can do is from an opinion, and then, on the basis of that opinion, institute the necessary procedures for the decision {479}[*16] to be made by the only competent authority, the Court. The forming of an opinion of this kind is plainly not reviewable, simply because it does not amount to a decision: cf Rotorua Aero Blue Inc v Air services Licensing Authority (Rotorua, M16/77, 17 June 1977, Barker J) cited in McGechan on Procedure p 2–6, para J72: 3.04(3)(e). Even if that be too restrictive a view, the inspectors' conclusions on the legality of the operation do not decide, prescribe or affect Mr. Sloan's 'rights, powers, privileges, immunities, duties, or liabilities', to use the words of the definition of statutory power of decision in s 3 of the Judicature Amendment Act. That occurs only when a decision to prosecute is made: or perhaps not until the Court gives judgment on the prosecution.
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> Secondly, and this may be another way of stating the first point. It is not every decision made under statutory authority that is subject to review. A decision must go beyond what is merely administrative or procedural: Philips & Pike Ltd v Commerce Commission x (Wellington, A 444/79, 14 December 1979, Davidson CJ) and *Marfart v Gilbert* [1986] 1 NZLR 434 cited in McGechan at p 2–12, para J72: 3.01(12); or the exercise of a [*17] function rather than a power: *Ruddlesden v Kapiti Borough Council* [1986] 6 NZAR 20. Quite plainly, the conclusions reached by the inspectors here are of this kind and so are not reviewable. To hold otherwise would, as Mr Neave submitted, open up the investigative processes of all law enforcement agencies to constant judicial review; and that cannot have been the intention of Parliament: see also *Van Duyn v Helensville Borough Council* [1984] 5 NZAR 55, 62.

[9] Pembekuan itu sebenarnya hanyalah satu prosedur untuk pengumpulan keterangan semata-mata, ianya adalah satu proses penyiasatan dan bukanlah satu keputusan yang boleh dilakukan semakan kehakiman oleh mahkamah ini. Ini lebih-lebih lagi jika dilihat pula kepada peruntukan s 57 AMLA yang berbunyi seperti yang berikut:

> 57 Validity of freeze, seizure or sale
>
> Where the freeze, seizure or sale of any property has been effected under this Act, the validity of such freeze, seizure or sale, or other form of disposal of such property, or of any destruction of the property in accordance with the provisions of this Act, in consequence of such freeze, seizure or sale, shall not be affected by any objection to it relating to the manner in which the freeze, seizure or sale was effected, or the place at which it was effected, or the person from whom it was effected, or the person to whom any notice of the freeze, seizure or sale was given, or omitted to be given, or any failure to conform to any procedural provision of this Act or of any other written law in effecting the freeze, seizure or sale.

[10] Seksyen 57 itu jelas menyatakan bahawa keesahan sesuatu pembekuan itu tidak akan terjejas oleh sebarang bantahan terhadapnya.

[11] Seksyen 44(3) memberi kuasa budi bicara kepada sesuatu agensi penguatkuasaan untuk mengeluarkan arahan seperti yang dipohon oleh pemohon di dalam permohonan ini. Adalah undang-undang yang mantap bahawa mandamus hanya boleh diperintahkan jika terdapat kewajipan untuk melaksanakan sesuatu tanggungjawab dan bukan terhadap kuasa budi bicara. Seksyen 44(3) AMLA itu ialah suatu kuasa yang bersifat budi bicara dan pelaksanaan suatu fungsi pentadbiran. Dalam kes *Workon Sdn Bhd v The Director of Lands & Surveys, Sabah* [1999] 4 MLJ 177 di ms 183 (perenggan e–g), Hakim Richard Malanjum (ketika itu) memutuskan seperti yang berikut:

> It is settled law that mandamus lies to secure the performance of a public duty in which an applicant has sufficient legal interest to the performance. The duty to be performed must be of a public nature such as duty imposed by statute, custom, common law and even contract, (see *Padfield v Minister of Agriculture, Fisheries and Foods* [1968] AC 997). Thus, where a statute imposes a duty, the performance or non-performance of which is not a matter of discretion, an order of mandamus may be issued. But if a power or discretion only, as distinct from a duty, exists an order of mandamus will not be granted by the court except to secure performance of a duty to exercise the discretion as maybe necessary, or a duty to exercise a genuine discretion or a discretion based on proper legal principles, (see *R v Port of London Authority; ex p Kynock Ltd* [1919] 1 KB 176 (CA); Judicial Review by Michael Supper stone QC and James Goudie QC at p 307). Further, it does not cover duty in relation to a matter of a private nature or character nor does it extend to the performance of a mere moral duty.

[12] Adalah juga jelas di dalam kes ini, kuasa budi bicara itu belum lagi dilaksanakan oleh responden. Walaupun pemohon pada hari yang sama perintah pembekuan itu diterima telah telah menulis kepada responden untuk melupuskan wang di dalam akaun Maybank yang berkenaan, responden belum lagi membuat keputusannya. Tanpa keputusan oleh responden; mahkamah ini tidak mempunyai sebarang kuasa untuk membuat perintah mandamus yang dipohon jikapun diandaikan bahawa pihak responden sememangnya mempunyai kewajipan, yang pada pandangan mahkamah ini tidak, untuk membuat arahan yang sedemikian. Jika mahkamah bertindak sedemikian, seolah-olah mahkamah telah mencampuri urusan siasatan di bawah s 44(1) itu. Pemohon sepatutnya menunggu sehingga pihak responden memberikan maklum balas atau menjawab surat pemohon itu sebelum belari untuk mendapatkan perintah mahkamah ini.

KESIMPULAN

[13] Saya bersetuju sepenuhnya dengan pihak Peguam Negara Malaysia dan menolak permohonan untuk kebenaran ini tanpa perintah untuk kos.

Permohonan ditolak tanpa perintah untuk kos.

Dilaporkan oleh Afiq Mohamad Noor